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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MARIO MIRANDA MADRIGAL, Defendant and Appellant.	B203957 (Los Angeles County Super. Ct. No. GA059712)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rafael Ongkeko, Judge. Affirmed.

David D. Carico, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Mario Madrigal was convicted, following a jury trial, of the murder of Isaias Torres in violation of Penal Code[1] section 187, subdivision (a) and the kidnapping of Torres in violation of section 207, subdivision (a). The jury found true the allegation that appellant personally used a firearm in the commission of the crimes and that a principal was armed in the commission of the crimes within the meaning of sections 12022.53, subdivision (b) and 12022, subdivision (a)(1). The jury also found true the special circumstance allegation that the murder was committed in the commission of a kidnapping within the meaning of section 190.2, subdivision (a)(17). The trial court sentenced appellant to life in prison without the possibility of parole.

Appellant appeals from the judgment of conviction, contending that there is insufficient evidence to support his conviction for kidnapping and the special circumstances finding, the trial court erred in responding to a jury question, his counsel provided ineffective assistance, the trial court erred in failing to instruct the jury on false imprisonment and that the cumulative effect of the errors was prejudicial. We affirm the judgment of conviction.

Facts

In November 2004, Nereyda Sosa had been dating Isaias Torres for about a year. Sosa lived in San Jose. At the end of November, Torres and Sosa's cousin Carlos Vargas went to San Jose to visit Sosa. On December 1, Torres and Vargas left San Jose to return to Los Angeles. Torres told Sosa that he was going to meet with appellant.

The two men drove back to Los Angeles in Torres's car. Between 4:00 and 4:30 p.m., Sosa spoke with Torres on his cell phone. He told her that he was meeting with appellant to see a house Torres was planning to buy. According to Vargas, Torres got off the freeway at Santa Anita and went to a Burger King where he met appellant. Between

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

4:30 and 5:00 p.m., Torres called Sosa and told her that he was at a Burger King in Los Angeles.

Appellant told Torres to follow him. Appellant got into a white truck being driven by a Hispanic male. Torres and Vargas followed appellant to a small street where they briefly stopped. Torres spoke with appellant on his cell phone, then began driving again. The next time they stopped, appellant and his driver came over to Torres's car holding guns. Appellant told Torres to open his door. When Torres complied, appellant pulled him out of the car. The driver told Vargas to get in the back of Torres's vehicle. Vargas complied. The driver took Vargas's wallet.

A black vehicle arrived with several armed men inside. Appellant put Torres in the back seat. Appellant said, "Let's go, let's go, let's go." Vargas heard vehicle doors closing, then within five seconds, a gunshot. The vehicles left.

Vargas got out of Torres's car and ran away. While running, he received a call from Sosa on his cell phone. He told her that appellant had taken Torres. Vargas's cell phone battery then died. Vargas went to a gas station and asked the cashier to call a taxi for him. The cab arrived about 30 minutes later. Vargas went to his cousin's house and from there later got a ride to his house in Riverside. He did not tell anyone about Torres's kidnapping because he was scared.

About 5:30 p.m. on December 1, Jorge Silva went to pick up his wife from a house on Arroyo Drive in San Gabriel. When he arrived, he saw a body lying in the street. Silva called police.

Both police and paramedics came to Arroyo Drive. Paramedics found Torres face down and fully clothed. Torres had two holes in his head and was not breathing. He was pronounced dead at 6:10 p.m.

Los Angeles County Sherriff's Department detectives found no witnesses who had heard a gunshot or seen the body dumped and no physical evidence such as bullet casings. Torres had no identification on his person. Torres's body was later identified from fingerprints obtained by the coroner's office.

The autopsy on Torres was performed by deputy medical examiner Dr. Louis Pena. Torres died from a gunshot wound to the head. That injury would have rendered him immediately unconscious. Torres had injuries on his hands which were incurred before death and were consistent with being in a fist fight. Torres also had bruises on his face caused by pressure from the muzzle of a gun. These bruises were inflicted before death.

On December 2, 2004, a police officer went to the home of Torres's brother Arturo Matamoros and told the family of Torres's death. That same day, Vargas went to Torres's house and told the family what had happened. Sosa had driven down from San Jose after learning that Torres was dead.

Los Angeles County Sheriff's Detective Dan McElderry interviewed Sosa and Vargas. Vargas identified appellant from a photographic line-up. Sosa told Detective McElderry that a couple of months earlier, Torres and appellant were involved in a fight in a nightclub which started because appellant touched Sosa's waist. Sosa was able to give the detective appellant's address.

Using Sosa's information, Detective McElderry located appellant's apartment on East Orangewood in Anaheim. The detective also learned that appellant owned a Toyota Tacoma pick-up truck. United States Immigration and Customs Enforcement records showed that appellant's truck had crossed the border into Mexico about 11:28 p.m. on December 1, 2004.

On January 30, 2005, a border patrol agent notified Detective McElderry that appellant's mother and sister had been detained while trying to enter the U.S. in appellant's truck. Detective McElderry followed the women to appellant's new residence in San Diego. Appellant was arrested.

At trial, Detective McElderry opined that Torres's murder was of a personal nature between him and his killer. He based this opinion on the fact that Vargas was not harmed and the movement of Torres from his car to the killer's car.

At trial, appellant offered the testimony of his wife, Hilda Madrigal, that in November 2004, appellant was living in Mexico and doing construction work in both

Mexico and the United States. On November 30, 2004, appellant was in Mexico for his son's birthday. He returned to the U.S. on December 1, 2004 to drive his niece home. Hilda expected appellant to return the same day. He did so.

Discussion

1. Sufficiency of the evidence

Appellant contends that there is insufficient evidence of asportation and so insufficient evidence to support the kidnapping verdict. We see sufficient evidence.

In reviewing the sufficiency of the evidence, "courts apply the substantial evidence test. Under this standard, the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses *substantial evidence* - that is, evidence which is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People* v. *Cuevas* (1995) 12 Cal.4th 252, 260-261, internal quotation marks and citations omitted.)

"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." (*People* v. *Jones* (1990) 51 Cal.3d 294, 314, internal citations omitted.)

Vargas testified that he heard a gunshot five seconds after Torres was placed in the kidnapping vehicle. Appellant contends that this shows that Torres was killed upon being placed in the vehicle, and thus the only movement of Torres by his captors was from Torres's car to the black car parked immediately behind his car. He concludes that this distance was insufficient to satisfy the asportation requirement for kidnapping. We do not agree.

The coroner's examination showed that Torres had bruises on his face and injuries on his hand which occurred before death. Vargas made no mention of a fight before

Torres was placed in the black car. The gunshot heard by Vargas occurred within five seconds of the vehicle door closing. If that gunshot had hit Torres in the head, it would have rendered him immediately unconscious. It is highly unlikely that Torres could have sustained multiple cuts and bruises in the less than five seconds between the door closing and the shot being fired. Vargas did not hear a second shot. Thus, Torres's injuries suggest that he was driven well away from the kidnapping scene, giving him time to struggle with his kidnappers before being killed.

Further, Sosa testified that she spoke with Torres about 5:20 p.m., and that he was crying. Vargas did not testify to a cell phone call on the drive to the house, or in the brief period the men were parked at the house. Vargas testified that Torres was moved straight to the killer's vehicle. The gunshot occurred five seconds after the door closed. There was no time or opportunity for the call to have occurred before the gunshot. Thus, the mere fact of the call with Sosa strongly suggests that Torres was not hit by that gunshot. The vehicle pulled away immediately after the gunshot, and Vargas did not hear a second shot. Thus, it is reasonable to infer that Torres was shot and killed well away from the site of the kidnapping. This would be sufficient evidence to show asportation.

Records of Torres's cell phone calls also support an inference of substantial movement. At 5:08 p.m., Torres called Sosa and told her that he was at a Burger King in South El Monte. That call was placed on Torres's cell phone and went through cell site 102 in South El Monte. The 5:20 p.m. call went through cell site 56 in Rosemead. This supports an inference that Torres was moved from the site of the kidnapping in South El Monte.

Appellant contends that Sosa's testimony about the 5:20 p.m. cell phone call is not credible and of solid value because she lied about who initiated the call and where she was during the call. He also contends that the cell phone tower was the same for the 5:08 and 5:20 phone calls and so does not show any movement.

The records for Torres's cell phone do show that Sosa called Torres at 5:20 p.m., contrary to her testimony that she called him. This alone does not render Sosa's testimony incredible or of no value.

The phone records do not show anything about Sosa's location during the call, however. Sosa testified that she was in San Jose during the 5:20 call. Appellant bases his contention that Sosa was in fact in southern California on the phone company representative's testimony that "[b]oth the originating and terminating cell site are the same" for the 5:20 call. Appellant appears to believe that originating refers to the person who began the call, in this case Sosa. Appellant is mistaken. This testimony refers to the cell site used by Torres's phone when the call began and when it terminated. It has nothing to do with Sosa's cell phone.

In explaining the meaning of entries on Torres's phone records, the cell phone company representative used the example of an entry for a call from Torres's phone to his voicemail. The representative explained that the records showed that the call was initiated on cell site 38 and terminated on cell cite 37. The prosecutor asked her to explain how that could happen. The representative explained: "[Y]our handset is designed to find the strongest signal. So it's constantly searching for the best signal available at whatever time throughout a call. We log when you hit – when you start on the network, we log the tower you hit off to originate the call. Then we log the tower you terminate on. [¶] It's completely possible to start on one tower and terminate on another or start on one tower and then terminate on the same tower. All throughout that call, your handset is still finding the strongest signal."

Appellant bases his contention that the two calls were placed from the same location on the fact that both calls went through "repole 268." He seems to believe that a repole is a cell tower. In fact, a "repole or switching station is just a piece on the network that a bunch of cell sites are routed through." Cell sites are towers located throughout a repole area. To identify the location of a call, one would first need the repole number. Then one would look at the list of cell sites in the repole area to determine the actual physical address of the cell site the phone used.

The 5:08 call used cell site 102 which is located in South El Monte. The 5:20 call used cell site 56 which is located in Rosemead. Both cell sites use repole 268 in Santa Fe Springs.

2. Sufficiency of the evidence – special circumstance

In his opening brief, appellant contends that the evidence showed only that the kidnapping was incidental to the murder and that the special circumstance allegation requires that there be an independent purpose for the commission of the kidnapping. In his reply brief, appellant acknowledges the kidnapping special circumstance does not require such an independent purpose. As appellant points out, section 190.2, subdivision (a)(17)(M) provides: "To prove the special circumstance of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder."

3. Jury question

Appellant contends that the trial court erred in its response to a jury question about kidnapping.

During deliberations, the jury sent the following two questions to the court: "1. If we feel that Vargas was moved by force from front seat to back seat, is that a substantial distance to constitute kidnapping? [¶] [2.] Question of law. [¶] If we were not presented with any evidence that Torres had a wallet to begin with and his jewelry was still on him – but we feel he (Torres) was kidnapped. But if they took Vargas wallet and he (Vargas) wasn't moved a substantial distance or kidnapped, is that 2nd degree robbery?"

The court stated: "My thinking here is that Mr. Vargas was – I mean that particular movement was not a charged crime for kidnapping." Appellant's trial counsel replied: "That's what I thought." The court continued: "Right. It's not an issue, so I don't know what the jury is thinking. I think maybe the simplest thing is just to say the kidnapping of Mr. Vargas is not an issue in the case. [¶] Is that good?" Appellant's counsel replied: "That would be fine." The prosecutor agreed. The court proposed giving the same response to the second question, and also telling the jury to let the court

know if it had a follow up question. The court asked counsel: "Okay. So I'll just tell them that; is that agreeable?" Appellant's counsel stated it was agreeable with him. The prosecutor agreed.

Appellant now contends that the trial court should have understood this question as also showing confusion about the concept of substantial distance, and should also have instructed the jury that the movement from the front to the back seat was not a substantial distance.

Respondent contends, and we agree, that appellant forfeited this claim by agreeing to the court's answer. (*People* v. *Rodrigues* (1994) 8 Cal.4th 1060, 1193; *People* v. *Bohana* (2000) 84 Cal.App.4th 360, 373.) Appellant contends that if this claim was waived by his counsel's acquiescence, he received ineffective assistance of counsel.

Appellant has the burden of proving ineffective assistance of counsel. (*People* v. *Pope* (1979) 23 Cal.3d 412, 425.) In order to establish such a claim, appellant must show that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 687-688, 694; *People* v. *Ledesma* (1987) 43 Cal.3d 171, 216-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland* v. *Washington*, *supra*, 466 U.S. at p. 694.)

We agree with appellant that the jury's questions show that they were focusing on whether a very short physical distance could constitute a substantial distance for purposes of kidnapping. In such circumstances, it would have been appropriate to refer the jury to the previously given instruction which defined substantial distance for purposes of kidnapping. (See *People* v. *Beardslee* (1991) 53 Cal.3d 68, 97.) However, even assuming that the trial court had a duty to give the instruction suggested by appellant, we see no reasonable probability that appellant would have received a more favorable outcome if the court had given such an instruction.

As we discuss in section 1, *supra*, the evidence shows that Torres was not shot at the scene of the kidnapping, but was driven far enough away from that location that the

gunshot which killed him was not heard by Vargas. This distance is not comparable to the few feet between the front and back seats of a car. Thus, even if the trial court had instructed the jury that movement from the front seat to the back seat of a car was not a substantial distance, such an instruction would not have furnished any guidance to the jury in evaluating the movement of Torres.

4. Ineffective assistance of counsel

Appellant contends that his counsel conceded during questioning and oral argument that a kidnapping had taken place, and that this concession amounted to ineffective assistance of counsel. He further contends that his counsel was ineffective for failing to object when the investigating officer opined that a kidnapping occurred and that Torres was the target.

In order to establish a claim of ineffective assistance of counsel, appellant must show that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland* v. *Washington, supra,* 466 U.S. at pp. 687-688, 694; *People* v. *Ledesma, supra,* 43 Cal.3d at pp. 216-218.)

We find defense counsel's performance to be objectively reasonable. We see no reasonable probability that appellant would have received a more favorable outcome if his counsel had referred to the kidnapping as alleged or claimed and had objected when the prosecutor failed to do so. Thus, appellant's claim fails.

Appellant complains of the following questions to Vargas: (1) whether when he was "stopped at the residential, the area being the area of the kidnapping and the robbery incident, did you hear anyone, including my client, saying that they were going to kill Mr. Torres?;" (2) "after you were robbed, you saw a kidnapping and possibly something else was going to happen;" and (3) "You can pinpoint the area where they stopped you at -- or they kidnapped and robbed you." Appellant also complains of the following question to the investigating officer: "Did you in fact travel from the location of the kidnap on Alicia to the location where the body was found?"

Although it might have been more precise for appellant's counsel to preface his references to kidnapping in his questions with a qualifying term such as "alleged" or "claimed," we do not view counsel's questions as conceding that the kidnapping occurred. It is just a casual or shorthand way of describing events. Further, the jury was instructed that questions by counsel are not evidence, and that they should not assume something is true just because one of the attorneys asked a question that suggested it was true. Jurors are presumed to understand and follow the court's instructions. (*People* v. *Holt* (1997) 15 Cal.4th 619, 662.) Here, we can be confident that they did so. Appellant's counsel referred to the robbery of Vargas in the same unqualified manner as to the kidnapping, and the jury acquitted appellant of robbery. Thus, we see no reasonable probability that appellant would have received a more favorable outcome if his counsel had prefaced his references to kidnapping with a qualifier such as "alleged."

Appellant also complains that his counsel did not object to questions by the prosecutor which elicited the following responses from the investigating officer: (1) "Carlos Vargas . . . agreed to accompany us to the area where the kidnapping occurred;" (2) "we asked him to direct us where the actual kidnapping had occurred;" (3) "the area that was indicated [on the photo] is the place where the kidnapping occurred;" (4) "we had . . . a wanted flyer out for him . . . for the kidnapping and murder;" and (5) "Alicia Street where the kidnapping actually occurred is .4 miles."

We do not agree that the prosecutor's questions were designed to or did elicit an opinion from the investigating officer that a kidnapping had occurred. Four of the five above-quoted references to kidnapping are merely a casual or shorthand way of referring to the location where Vargas told police a kidnapping occurred. The fifth reference, to the wanted flyer, shows only that police were looking for a suspect in reported crimes which the police were investigating. No objections were necessary.

More generally, we do not agree that counsel's strategy reflected a concession that a kidnapping had occurred. Appellant's defense was that Vargas was involved in the murder of Torres and had made up the kidnapping story to cover up his own involvement, and possibly also Sosa's involvement. This was certainly a reasonable defense strategy,

given Vargas's failure to call police after the kidnapping and the obvious fact that it is very unusual to leave a witness to a murder alive.[2]

5. False imprisonment

Appellant contends that the trial court erred in failing to instruct the jury, sua sponte, on the lesser included offense of false imprisonment. Assuming for the sake of argument that the trial court erred, we would see no reasonable probability that appellant would have received a more favorable result if the instruction had been given.

False imprisonment is a lesser included offense of kidnapping. (*People* v. *Chacon* (1995) 37 Cal.App.4th 52, 65; *People* v. *Magana* (1991) 230 Cal.App.3d 1117, 1120-1121.)

A trial court has a sua sponte duty to instruct on general principles of law relevant to issues raised by the evidence at trial in a criminal case. That obligation includes the duty to instruct on lesser included offenses when the evidence raises a question as to whether all the elements of the charged offense are present and there is substantial evidence to support a jury determination that the defendant was guilty of the lesser offense. (*People* v. *Breverman* (1998) 19 Cal.4th 142, 154.)

If a trial court erroneously fails to give an instruction on a lesser included offense, we examine the entire record, including the evidence, to determine if it is reasonably probable that appellant would have received a more favorable outcome in the absence of the error. (*People* v. *Breverman*, *supra*, 19 Cal.4th at pp. 165, 175-176; Cal. Const., art. VI, § 13.)

Kidnapping occurs when a person is unlawfully moved by force or fear without the person's consent, and the movement was for a substantial distance. (*People* v. *Jones*

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[2] Contrary to appellant's suggestion, we do not understand his counsel's decision to call appellant's wife as an unreasonable attempt to provide an alibi defense. The purpose of her testimony seems to have been to explain why appellant was in the U.S. for a brief time on the day of the murder, then returned to Mexico after the murder, and thus at least in part to negate an inference of guilt from appellant's "flight."

(2003) 108 Cal.App.4th 455, 462.) False imprisonment occurs when a person is compelled to stay or go somewhere against his will. (*People* v. *Checketts* (1999) 71 Cal.App.4th 1190, 1194.) Thus, false imprisonment can occur with any movement or no movement. (*People* v. *Reed* (2000) 78 Cal.App.4th 274, 284.) "[A] lesser included offense instruction is not required where the evidence establishes that defendant was either guilty of kidnapping or not guilty at all." (*People* v. *Ordonez* (1991) 226 Cal.App.3d 1207, 1233; see *People* v. *Bittaker* (1989) 48 Cal.3d 1046, 1100.)

Appellant contends that an instruction on false imprisonment was warranted because the jury might have found that the movement of Torres from his vehicle to the black vehicle was only incidental to the murder, and so was not a substantial movement within the meaning of the kidnapping statute. Appellant contends that the jury could have found that Torres was killed inside the white car before it drove off.

As we discuss, *supra*, Vargas's and Sosa's testimony shows that Torres was alive when the car drove off, and the movement of Torres was thus substantial. If the jury believed Vargas and Sosa, the crime of kidnapping was established.

If, as appellant suggest, the jury disbelieved Vargas's account of hearing a gunshot after the car drove off and Sosa's account of a telephone call from Torres while he was in the black vehicle, the jury was left with no account of the events preceding Torres's killing. The jury would have no basis to find that appellant was falsely imprisoned before being killed, or that he was kidnapped. Thus, we see no reasonable probability that the jury would have convicted appellant of false imprisonment rather than kidnapping if instructed on the lesser offense of false imprisonment.

6. Cumulative error

Appellant contends that even if no one error standing alone was prejudicial, the cumulative effect of those errors was, and requires reversal on the kidnapping conviction and special circumstance allegation.

We found no prejudice from the minor claimed error in this case, and the cumulative impact of those errors did not render the trial unfair. (See *People* v. *Jenkins* (2000) 22 Cal.4th 900, 1056.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.